

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KILEY B CARON
Claimant

WINDROW RESTAURANT
Employer

APPEAL 16A-UI-12433-LJ-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 10/23/16
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the November 17, 2016, (reference 02) unemployment insurance decision that denied benefits based upon a determination that he was discharged from employment for failure to follow instructions in the performance of his job. The parties were properly notified of the hearing. A telephone hearing was held on December 7, 2016. The claimant, Kiley B. Caron, participated. The employer, Windrow Restaurant, participated through Janet Hayes, owner; and Diane Poore, night manager.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time (30-40 hours each week), most recently as a cook, from November 30, 2015, until October 26, 2016, when he was discharged.

Claimant last reported to work on October 23, 2016. That day, he clocked in at 8:00 a.m. and was scheduled to work until 3:00 p.m. The employer testified that claimant was sent home around 11:45 a.m. that day for refusing to do his job. Specifically, Hayes testified that claimant failed to put food down in the fryer or on the grill when the lead cook was calling out tickets. Neither Hayes nor Poore was present on October 23 while claimant was allegedly not performing his job. Hayes testified that she came in a little afternoon and the cook stated that he had sent claimant home. Claimant denies that he refused to perform his job. He testified that he clocked out at 1:57 p.m., as the restaurant had slowed down and two cooks were not needed any longer.

Claimant and Hayes had a conversation on October 8 regarding his work for the restaurant. Claimant testified that Hayes spoke to him that day to ask him to transfer to day shift, to see if he would work out better with the day crew. Hayes testified that she spoke to claimant on October 8 about his refusal to perform his job. Hayes claims that claimant asked if he was going to be fired, but claimant denies asking this. Later that evening, the employer maintains

claimant refused to perform his job and was walking around without focus. Neither Hayes nor Poore were in the kitchen that evening. The employer states claimant was sent home that night for refusing to work, but claimant claims he was told he could go home because there was not enough work for everyone who was scheduled. Claimant admits that he frequently multitasked and would not often stand in one place while working, but he denies he was aware this was an issue. Both parties also testified about an incident involving claimant preparing a large pot of spaghetti, though they did not agree on when this incident occurred.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

Iowa Code § 96.5(2)a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

Iowa Admin. Code r. 871-24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds claimant provided a more credible explanation of the end of his employment than the employer. The employer maintains claimant was discharged for poor work performance and refusal to work, but it did not provide a firsthand witness that could testify as to what specifically claimant refused to do. The administrative law judge understands that another witness was scheduled to participate for the employer but was not available due to an emergency. However, the employer did not request a postponement so that this witness could participate.

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the incident under its policy.

An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. The employer has not met its burden of proving claimant was discharged for disqualifying, job related misconduct. Benefits are allowed.

DECISION:

The November 17, 2016, (reference 02) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed

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